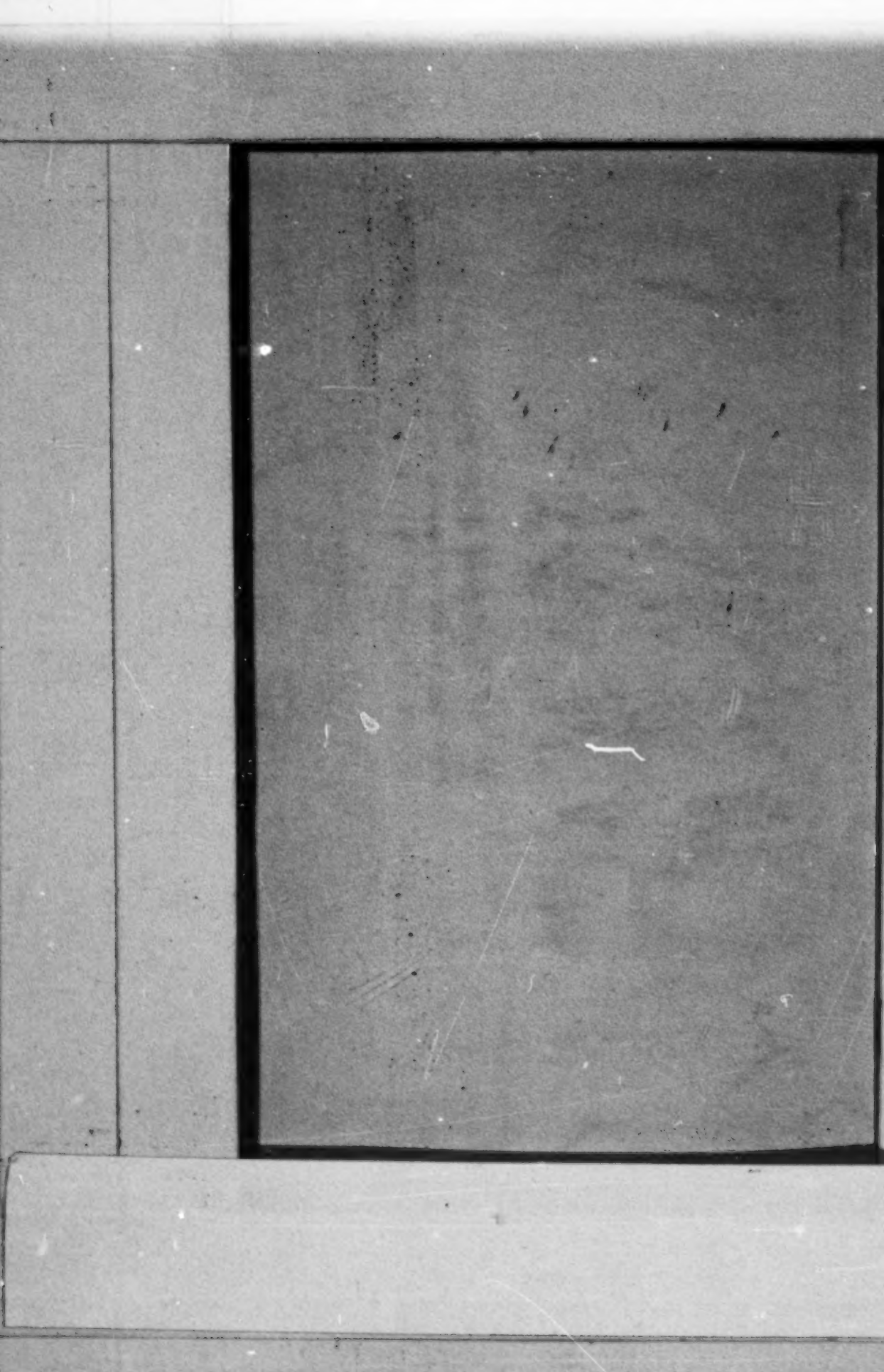

73-241

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENTS AL PHILLIPS, JR., ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

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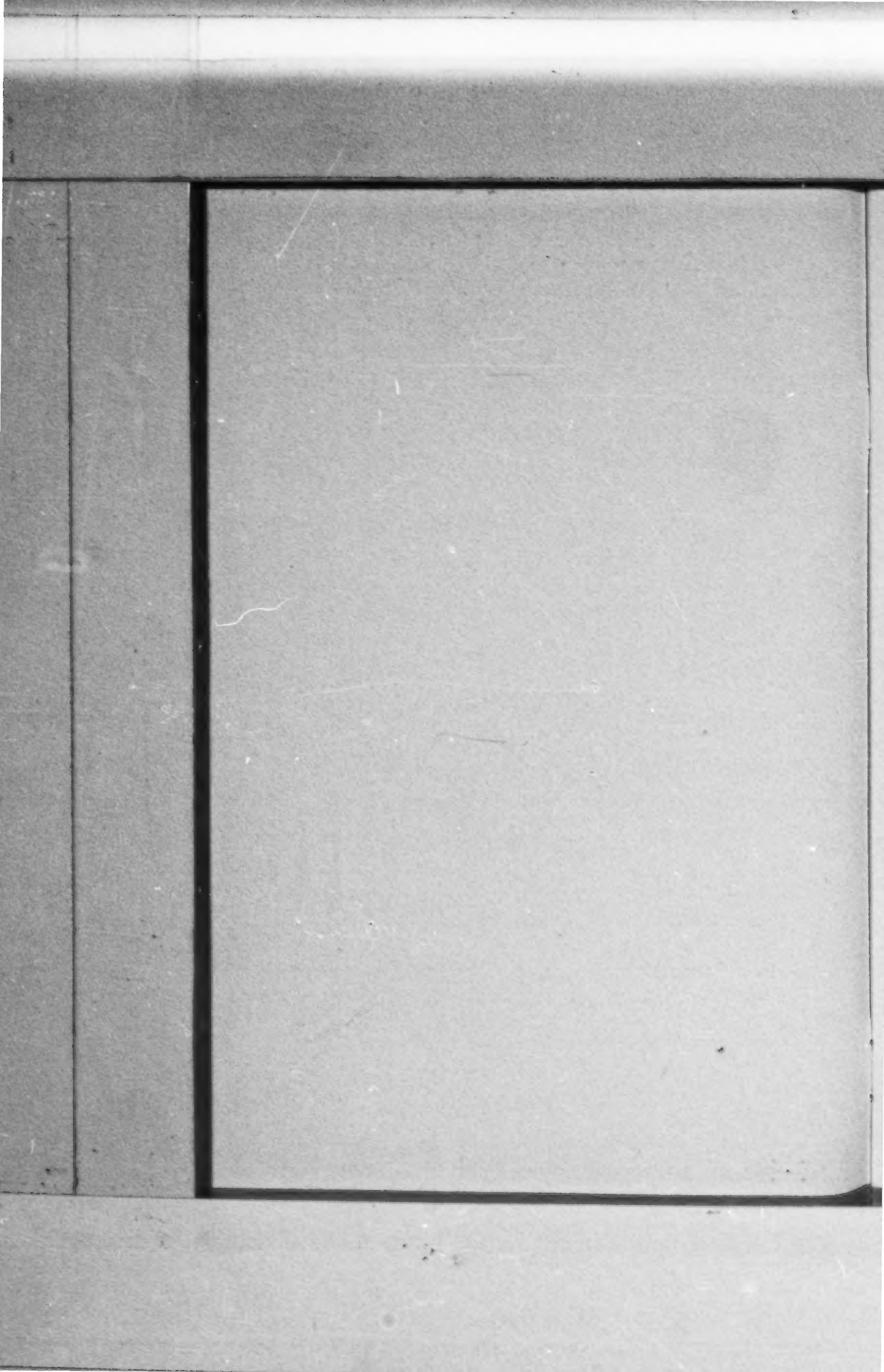
Dated: October 10, 1973



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-214

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

DARRYL B. DEAKTOR,
Respondent,

and

CHICAGO MERCANTILE EXCHANGE,
Petitioner,

vs.

AL PHILLIPS, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENTS AL PHILLIPS, JR., ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

ISSUE PRESENTED.

Whether the Court of Appeals, having found that the Chicago Mercantile Exchange's conduct is in no sense arguably protected by the Commodity Exchange Act, properly affirmed the District Court's refusal to stay proceedings pending exercise of jurisdiction by the Commodity Exchange Commission.

COUNTER STATEMENT OF CASE.

Respondents are twenty-four (24) traders who, at the close of trading on March 17, 1970, held futures contracts to purchase March 1970 fresh eggs on the Petitioner, Chicago Mercantile Exchange (hereinafter "CME"). On May 21, 1970, they commenced these proceedings to recover monetary damages for themselves individually and as representative parties on behalf of all other traders similarly situated.

Respondents allege that the CME, certain of its officers, its Business Conduct Committee, and other traders who, at the close of trading on March 17, 1970, held futures contracts to sell March 1970 fresh eggs on the CME, combined, agreed and conspired to unreasonably restrain and to monopolize the trading in and of March 1970 fresh eggs on the CME in violation of §§ 1 and 2 of the Sherman Act.[1] (Complaint ¶ 45.) This combination, agreement and conspiracy was furthered and effected by a March 17, 1970, ruling of the Business Conduct Committee of the CME. This ruling required certain broker-clearing members who held, or represented others who held contracts to purchase March, 1970 fresh egg futures to (1) liquidate fifty percent of their house and customer contracts to purchase March, 1970 fresh egg futures by the close of business, March 18, 1970; and (2) deposit with the Department of Audits and Investigations of the CME by 10:00 A. M. on March 19, 1970, a certified check for the full value of any remaining contract to purchase March, 1970 fresh egg futures on which the holder thereof desired to take delivery. (Complaint, ¶ 47; Exhibit "A".)

1. The CME contends that the Court of Appeals failed "to distinguish between the allegations of manipulation lodged against certain traders and the complaint made against CME of failing to enforce its rules." (CME Petition p. 8.) CME thereby seeks to confuse the respondents' claim in this respect, i.e., that the CME's failure to provide respondents with notice or an opportunity to be heard and to comply with Rule 217(D) were acts in furtherance of a combination, agreement and conspiracy between the CME and others to manipulate the market.

This ruling was made by the CME without according even a semblance of due process to respondents and the others affected thereby. CME Rules fail to provide *customer-traders* with any notice of or opportunity to be heard in connection with Business Conduct Committee rulings. Rule 217(D) of the *Rules of the Chicago Mercantile Exchange*, on the other hand, provides that *broker-clearing members* affected by Committee action shall receive such notice and a right to be heard. (Supp. App. 1.)[2] In this instance, however, the Committee totally disregarded the Rules. Neither the broker-clearing members affected by the March 17, 1970, order of the Business Conduct Committee, or their customers, were ever advised of any investigation by or afforded an opportunity to appear before the Business Conduct Committee to offer testimony, explanation or justification as provided for in said Rule. (Complaint ¶ 47G; Harris 20; Phelan 45-47, 52-54; O'Brien 21-22; Goldstant 26-28; Brodskey 13, 24; Melamed 35.)[3] Furthermore, the March 17, 1970, ruling of the Business Conduct Committee was never made public; only those broker-clearing members directly affected were advised of the Committee's ruling after it already had been made. The ruling was never communicated to respondents or members of the class, even though its effect was to close out their contracts involuntarily.

Respondents further allege that the failure of the CME to afford those affected by the March 17, 1970, ruling of the Business Conduct Committee the requisite notice and opportunity to be heard provided for in Rule 217(D) constitutes a violation of the CME's duties under §§ 5a(8) and 9(b) of the Commodity Exchange Act. (Complaint ¶¶ 51, 55 and 56.)

Section 5a(8) requires the CME, as a contract market to:

> "enforce all . . . rules . . . made or issued by it . . . which relate to terms and conditions in contracts of sale to be

2. "Supp. App." refers to the Supplemental Appendix attached hereto.

3. References herein to deposition testimony are by the deponent's last name and page citation.

executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . ."

As a result of the CME's failure to enforce Rule 217(D) as required by § 5a(8), respondents and others similarly situated were forced to comply with the March 17, 1970, ruling of the Business Conduct Committee of the CME without benefit of any hearing or notice or other procedural and substantive safeguards against the inequitable treatment of those trading on the CME which are part of the rules and regulations of CME as approved by the United States Secretary of Agriculture. (Complaint ¶ 54.)

This conduct also violated § 9(b) of the Commodity Exchange Act in that (1) it constituted an attempt to and a manipulation of the price of a commodity for future delivery on a contract market; and (2) the CME's notification of some, but not all, of those trading in March, 1970 fresh egg futures on the CME of the March 17, 1970, ruling of the Business Conduct Committee of the CME constituted knowledgeable delivery for transmission in interstate commerce by the mails and telephone of misleading (by omission) information concerning conditions that affect or tend to affect the price of a commodity in interstate commerce. (Complaint ¶¶ 55, 56.) This combination, agreement, conspiracy and failure to enforce CME Rules was calculated to and did reverse the rising market price for March, 1970 fresh egg futures on the CME. As a result, respondents and others similarly situated were forced to liquidate their contract positions at artificially depressed prices, thus receiving less than they would have received in a free market. (Complaint ¶¶ 39, 48.)

Extensive discovery has been taken by both sides. Depositions of eleven (11) of the respondents have been taken; production has been made of substantially all of the documents concerning respondents' trading in March, 1970 fresh egg futures; and each respondent has answered the CME's comprehensive interroga-

tories. Depositions of the CME and seven (7) of its officers and Committee members have also been taken. Production of substantially all of the documents of the CME concerning the Business Conduct Committee's ruling of March 17, 1970, has been made. Respondents subpoenaed and received substantially all of the customer trading records of fifteen (15) brokerage houses which held the largest house and/or customer positions in the March, 1970 fresh egg contract.

Subsequent to the completion of such discovery, the CME, on August 17, 1971 [some fifteen (15) months after filing of the Complaint], first moved to stay the present proceedings pending exercise of jurisdiction by the Commodity Exchange Commission. (No proceeding is or ever has been pending before the Commission.) On September 17, 1971, the District Court denied the CME's motion. On October 5, 1971, the CME petitioned the District Court to reconsider its Order of September 17, 1971. By Order dated October 14, 1971, the District Court denied the CME's petition for reconsideration but certified the issue raised therein in accordance with the provisions of 28 U.S.C. § 1292(b).

On October 20, 1971, the CME filed a petition with the Court of Appeals for the Seventh Circuit for leave to appeal from the District Court's interlocutory order. The petition was granted on November 3, 1971. Briefs were filed but oral argument was not held until after this Court's decision in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). Following such decision, oral argument was scheduled and on May 21, 1973, the Court of Appeals affirmed the orders of the District Court denying a stay of proceedings pending exercise of jurisdiction by the Commodity Exchange Commission. The CME's petition for rehearing *en banc* was denied on June 26, 1973, and a subsequent motion to recall and stay the mandate was denied on July 11, 1973. On August 4, 1973, the CME petitioned this Court to issue a writ of certiorari.

REASONS FOR DENYING THE PETITION.

I.

THE CME'S TOTAL DISREGARD FOR DUE PROCESS PRECLUDES ANY JUSTIFICATION OF ITS CONDUCT.

Commodity exchanges such as the CME are, by their very nature, combinations in restraint of trade. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231 (1918). Thus, were it not for the enabling legislation contained in the Commodity Exchange Act (hereinafter "Act"), the CME would constitute a group boycott violative of the Sherman Act. The Act does not, however, immunize all—or even most—exchange conduct. As stated in *Silver*, repeal of the antitrust laws is to be inferred from a regulatory scheme "only if necessary to make the [Act] work, and even then only to the minimum extent necessary." (373 U. S. at 357.)

In *Silver*, plaintiffs, non-members of the Exchange seeking an injunction and treble damages, alleged that the Exchange had, in violation of §§ 1 and 2 of the Sherman Act, conspired with its member firms to deprive plaintiffs of their private wire connections with Exchange members. The action of the Exchange in ordering certain of its members to remove the wire connection previously in operation between their offices and those of the non-members had been taken pursuant to rules which the Exchange had adopted under the Securities Exchange Act of 1934, but the action was taken without notice to petitioners or an opportunity for them to be heard.

The Court in *Silver* held that the Exchange's failure to notify the non-members affected by its action of the underlying charges and to afford them an opportunity to explain or refute the

charges against them constituted such an obvious and complete denial of due process as to *preclude any justification* for antitrust immunity. *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 361 (1963).

Silver demonstrates that a self-regulatory exchange cannot avoid antitrust liability where its rules fail to afford non-members the guarantees of fundamental due process. In this regard the CME Rules totally fail to provide non-member customers (such as respondents) with any notice whatsoever of investigations undertaken or actions contemplated by the Business Conduct Committee. Customers are thus denied any opportunity to answer or explain charges which may have been made against them and which charges may form the basis for Committee rulings. Rules which fail to provide such basic due process do not even reach the threshold of justification required for a claim to antitrust immunity. (373 U. S. at 341.) Furthermore, nothing in the terms or policy of the Act requires or even contemplates that the CME be permitted to deprive traders of contract profits without notice and opportunity for a hearing. Therefore, just as in *Silver*, neither the Act nor the CME Rules pose any barrier to this antitrust action.

II.

RESPONDENTS' ALLEGATIONS POSE NO POTENTIAL CONFLICT BETWEEN THE COMMODITY EXCHANGE ACT AND THE ANTITRUST LAWS; RICCI DOES NOT, THEREFORE, REQUIRE THE EXERCISE OF PRIMARY JURISDICTION BY THE COMMODITY EXCHANGE COMMISSION.

The CME contends, however, that its conduct is justified by the Act, and further, that the ruling in *Ricci*, *supra*, precludes the courts from denying its request for a stay of proceedings and requires respondents to request the initiation of proceedings before the Commodity Exchange Commission (hereinafter "Commission") as a prerequisite to continuing with their present action.

To the contrary, in *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), this Court set forth the circumstances under which the doctrine of primary jurisdiction requires that alleged violations of both the antitrust laws and the Act must be heard in the first instance by the Commission rather than the federal district courts. The Court held that primary reference to the Commission is required *only where* (1) "it will be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action';" (2) "some facets of the dispute between [the parties is] within the jurisdiction of the Commodity Exchange Commission" and (3) "adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question."[4] (409 U. S. at 302.) For the reasons set out below, respondents believe that the Court of Appeals correctly concluded that the foregoing factors requiring exercise of primary jurisdiction by the Commission are not present in this action and, accordingly, that the District Court properly refused to stay its proceedings pending Commission action.

A. CME's Conduct Is Not Arguably Protected from Antitrust Attack by the Commodity Exchange Act.

As stated by this Court in *Ricci*, the issue of primary jurisdiction arises only "when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." (409 U. S. at 299-300.) *Ricci* involved an allegation that the CME transferred Ricci's membership in violation of CME rules and the Act. The CME contended, on the other hand, that its actions were in accordance with its rules and the Act, and further, that its conduct was immune from antitrust attack because it was in furtherance of the Act's regulatory scheme.

4. The Court did not hold, as contended by the CME at pp. 9-10 of its Petition, that all actions against commodity futures markets, such as the CME, must be stayed pending exercise of primary jurisdiction by the Commission.

The Court noted that the Act contemplates a membership organization with standards for the acquisition, retention and loss of membership and, further, that an "Exchange and its members 'will engage in restraints of trade which might well be unreasonable absent sanction' by the Act." The Court then concluded that if Ricci lost his CME membership pursuant to a valid CME rule, it would be necessary for the federal courts to determine whether the CME's conduct was immune from antitrust attack because it was pursuant to a rule which was a necessary and integral part of the exchange self-regulation contemplated by the Act. The Court also stated, however, that if Ricci's loss of membership was contrary to CME rules "the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent . . . that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive." (409 U. S. at 304.)

The Court's decision in *Ricci* is clearly premised on its conclusion that there was "substance" to the CME's claim to antitrust immunity. In the present proceeding, by contrast, there is no basis whatsoever for concluding that the CME's conduct is arguably protected. The Business Conduct Committee's ruling of March 17, 1970, clearly violated the requirements of due process as well as CME Rule 217(D). The Rules, as stated *supra*, do not provide non-member customers—the real parties in interest—with notice of Committee investigations or an opportunity to be heard. Rule 217(D) does provide for such notice to clearing members, but nonetheless the Committee, by its own admission, failed even to give affected clearing members any notice or opportunity to be heard prior to making its March 17, 1970, ruling. (O'Brien 21-22, 24-25; Goldstant 26-28; Brodskey 13, 24; Phelan 45-47, 52-54.)

Such acknowledged failure to enforce its own rules is likewise a conclusive violation of § 5(a)8 of the Act. And where, as respondents allege, such ruling was in furtherance of and with the purpose of effectuating a combination, agreement and con-

spiracy to restrain trade by manipulating the market for a commodity, there is no doubt but that the CME's conduct violates § 1 of the Sherman Act and § 9(b) of the Act. Thus, unlike *Ricci*, there is no substance to the CME's claim to antitrust immunity—a conclusion unanimously reached by the Court of Appeals below. (App. 10a-11a.)

B. This Proceeding Involves No Potential Conflict Between the Commodity Exchange Act and the Antitrust Laws.

Respondents do not allege that Rule 217(D) violates either the Act or the antitrust laws. To the contrary, respondents contend that it was the CME's failure (a) to provide customers with notice and an opportunity to be heard and (b) to comply with its own Rule 217(D) by giving the required notice and opportunity to be heard which constitutes a violation by the CME of both the Act and the antitrust laws. The present proceeding is thus unlike *Ricci* in two important respects: (1) there is no basis for the CME's present claim to antitrust immunity and (2) there is no potential for conflict between the two regulatory schemes. And, as this Court held in *Ricci*, where the alleged exchange conduct is not arguably protected, and there is no other basis for potential conflict between the Act and the antitrust laws, there is no reason to defer to the Commission and the antitrust action should "take its normal course." (409 U. S. at 304.)

III.

PROCEEDINGS BEFORE THE COMMODITY EXCHANGE COMMISSION WOULD NOT BE OF MATERIAL AID IN RESOLVING ANY ISSUE OF IMMUNITY FROM THE ANTITRUST LAWS.

The third premise for this Court's decision in *Ricci*, was the Court's belief that hearings before the Commission would materially aid in resolving the antitrust immunity question presented by that case. As just noted, however, the CME's conduct presently challenged is in no sense arguably protected, and

there is no potential conflict between the Act and the antitrust laws in this proceeding. There is, therefore, no immunity question for the Commission to aid in resolving.

A similar situation was presented in *Seligson* v. *New York Produce Exchange*, 1973-2 CCH Trade Cas. ¶ 74,620 (S. D. N. Y. July 19, 1973), where the court was asked, on the basis of this Court's decision in *Ricci*, to reconsider a previous refusal to stay proceedings pending exercise of jurisdiction by the Commission. In construing *Ricci*, the court stated,

> "It is evident, therefore, that the Court based its application of the doctrine of primary jurisdiction on the possibility that conduct alleged as violative of the antitrust laws was authorized by the Commodity Exchange Act and immune, by virtue of that authorization, from antitrust attack. As a consequence it would appear that where a complaint alleges conduct under color of Commodity Exchange Act authority which is clearly violative of the Act and outside the scope of any authority granted to the defendant exchange members, referral to the Commission would not be, in the language of the Court's third premise, 'of material aid in resolving [any] immunity question'."

As in *Seligson*, referral to the Commission in this case would not aid in resolving any immunity question; there is no such question here for the court to resolve.

IV.

THE EXPERTISE OF THE COMMODITY EXCHANGE COMMISSION IS NOT REQUIRED.

This case involves the determination of a single issue: whether defendants conspired to manipulate the March 1970 futures market in fresh eggs by *inter alia*, issuing a ruling through the Business Conduct Committee without affording respondents, and other members of the class, either notice or an opportunity to be heard. Such an issue does not involve any basic administrative policy determination or exercise of discretion. Market manipu-

lation is expressly prohibited by the Act. *Great Western Food Distributors, Inc.* v. *Brannan*, 201 F.2d 476 (7th Cir. 1953).

It is also important to note what this case does not involve. The correctness of the CME's determination that the March, 1970 fresh egg contract was not liquidating properly is not at issue. Respondents challenge the CME's failure to afford them, and other members of the class, with the fundamentals of due process. As noted in *Silver*, such lack of due process in and of itself constitutes a violation of the antitrust laws without regard to the substantive correctness of the CME's ruling.

Moreover, the facts relating to this issue of conspiracy can easily be determined by a federal court, which is "the repository of antitrust expertise." (*Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994.) Lay juries, under proper instruction from the Court, could determine all factual issues involved.

V.

THE COMMODITY EXCHANGE COMMISSION CANNOT GRANT THE REMEDY SOUGHT.

Respondents seek nothing but monetary damages for the injury caused them by the completed action of the CME and others. The Commission and Secretary, however, are without power to award damages. The enforcement powers of the Commission and the Secretary, as expressed in the Act, are limited to (1) cease and desist orders, and (2) suspension or revocation of designation as a contract market or license. None of these enforcement powers could remedy the damage done to plaintiffs by the completed action of defendants. Reference to such an impotent body serves only to frustrate or delay plaintiffs' right to their day in court. See *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441, 448 (2d Cir. 1968), *cert. denied*, 393 U.S. 846; *Baird* v. *Franklin*, 141 F.2d 238, 244-46 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1945); *Trans World Airlines, Inc.* v. *Hughes*, 214 F.Supp. 106,

111-12 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 602 (2d Cir. 1964). To require respondents to seek action by the Commission is to require a futile act.

VI.

DISCOVERY IN THE DISTRICT COURT IS ALMOST COMPLETED AND RESORT TO THE COMMODITY EXCHANGE COMMISSION WOULD ONLY RETARD, NOT ADVANCE, THE OVERALL DETERMINATION OF THIS MATTER.

The CME chose not to request a stay of proceedings until after extensive discovery had been taken. Only after fifteen (15) months, twenty (20) depositions and lengthy document production and examination did the CME raise the issue of primary jurisdiction.

The United States District Court for the Southern District of New York, under similar circumstances, denied a stay, noting that:

> "This action was initiated on April 11, 1966. Its already long procedural history reveals massive discovery and extensive pretrial activity over a period of more than five years. To date, this action has proliferated to such an extent as to require entries filling five and one half sheets of the docket records of this court.
>
> • • • • •
>
> ". . . more than five years have elapsed during which the parties have vigorously pursued their preparations for trial and massive accumulations of papers and documents already form a part of the current proceedings. To thrust all this aside *in medias res* to permit administrative intervention would not serve the orderly disposition of this litigation." *Seligson* v. *New York Produce Exchange*, BNA Antitrust Trade Reg. Rep. No. 358, p. A-6 (S.D.N.Y. 1971).

Respondents are and for over two years have been prepared to go to trial in the District Court. Resort to Commission proceedings at this time would only further impair their ability to obtain a prompt and orderly adjudication of their claims.

CONCLUSION.

The decision of the Court of Appeals is correct. For the reasons stated herein, the Chicago Mercantile Exchange's Petition should be denied.

Respectfully submitted,

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Dated: October 10, 1973

SUPPLEMENTAL APPENDIX.

RULES OF THE CHICAGO MERCANTILE EXCHANGE.

217. BUSINESS CONDUCT COMMITTEE.

A. Membership. The Chairman of the Board with the approval of the Board shall appoint from the membership five members and one alternate as a Business Conduct Committee, including a Governor as Chairman, each to be appointed to serve during the Chairman's term of office and until a new Committee is appointed and approved. A vacancy in the Committee shall be filled for the unexpired term in the same manner as provided above.

B. Qualifications of Members. No person shall serve as regular or alternate member unless and until he has first pledged to the Exchange that during the period of such service he will not publish, divulge, or make known in any manner except when reporting to the Governors or to a committee concerned with such information, or when called upon to testify in any judicial or administrative proceeding, any facts regarding the business of any person or any other confidential information which may come to the knowledge of such member in his official capacity. Violation of the pledge shall be a major offense.

C. Duties of Committee. The Committee shall determine the manner and form in which its proceedings shall be conducted. A representative of the Commodity Exchange Authority may be invited to attend any or all meetings of the Committee. The Committee shall be charged with the duty and authority to prevent manipulation of prices and the cornering of any commodity as provided in Section 5(d) of the Commodity Exchange Act, and shall also have general supervision of the business conduct of members and Clearing Members, particularly in so far as such conduct affects:

(1) Non-member customers.

(2) The public at large.

(3) The State Government.

(4) The Federal Government.

(5) Public opinion.

(6) The good name of the Exchange.

D. Performance of Duties. The Committee in performing its duties may investigate the dealings, transactions, and financial condition of members and Clearing Members, may examine their books and papers upon request, and may prescribe such capital requirements as it deems appropriate. The Committee may employ such auditors and other assistants as it may deem necessary, and all expenses incident thereto shall be payable from the funds of the Exchange. Members and Clearing Members under investigation shall be advised of the nature of the investigation and may appear before the Committee and offer such testimony, explanation, or justification as they may wish. If, as a result of any investigation, the Committee finds that a particular course of conduct is, or thereafter would be, unfair or unjust, or in violation of the law or the rules of the Exchange, or calculated to impair the good name of the Exchange, the Committee shall notify the member or Clearing Member, as the case may be in writing of its conclusions and direct such member or Clearing Member to cease and desist from such past or proposed conduct. In addition, the Committee may order such member or Clearing Member to:

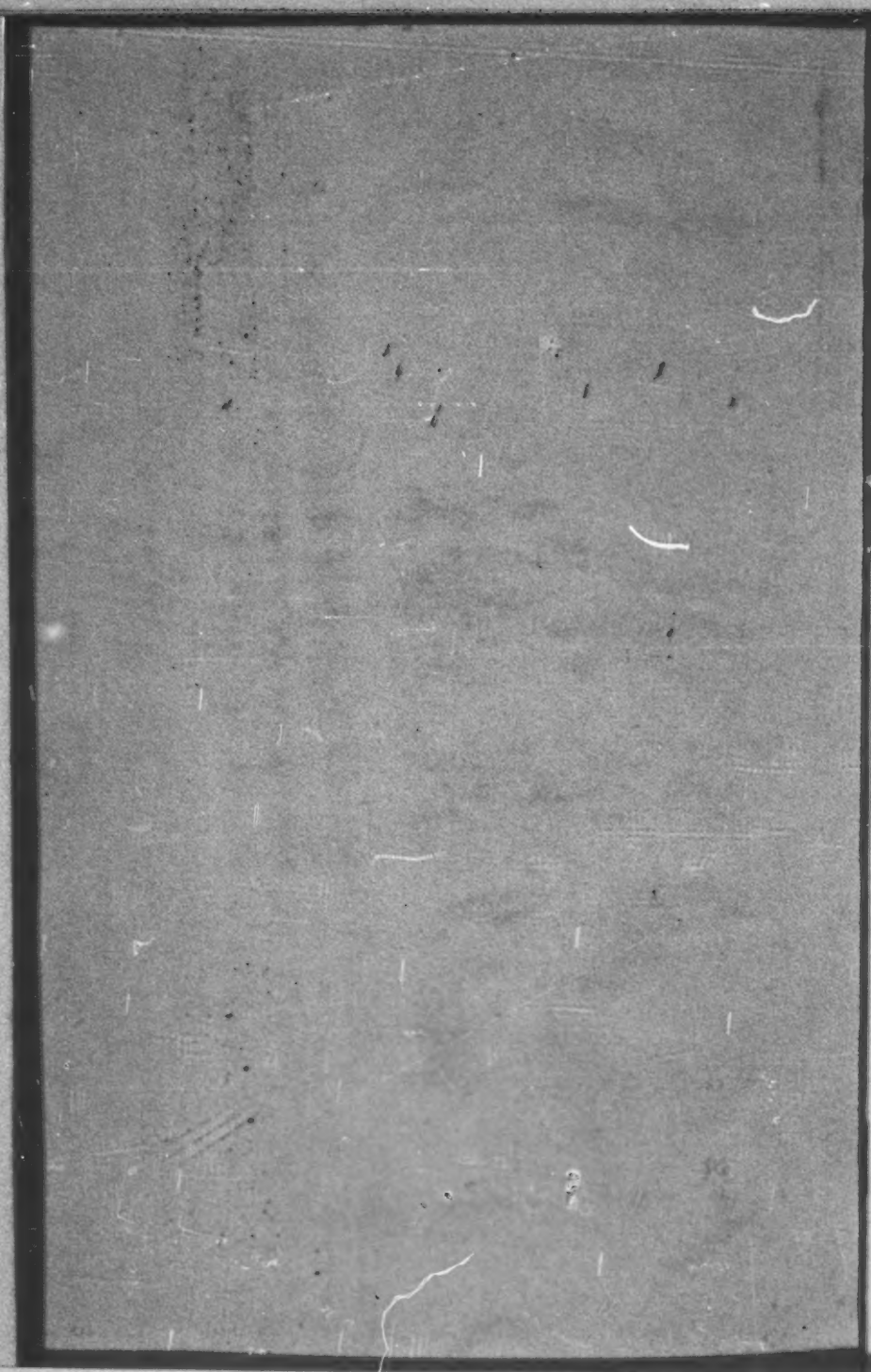
(1) Liquidate such portion of his and/or its customers' open contracts as the Committee deems necessary.

(2) Deposit such additional margins with the Exchange as determined by the Committee.

Any member or Clearing Member who fails to appear before the Committee pursuant to its request or to submit his or its books and papers to the Committee for examination, or who conducts himself or itself in violation of any order of the Com-

mittee after having been duly notified thereof, shall be charged by the Committee with an offense against the Exchange, and, if found guilty by the Board shall be either expelled or suspended.

E. Nothing in this rule shall relieve the President of his duties and responsibilities as outlined in the rules.



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AL PHILLIPS, JR., ET AL.,
Respondents.

REJOINDER OF RESPONDENTS AL PHILLIPS, JR.; ET AL. IN OPPOSITION TO THE CHICAGO MERCANTILE EXCHANGE'S PETITION FOR A WRIT OF CERTIORARI.

The reply brief filed by the Petitioner Chicago Mercantile Exchange ("CME") contains a material misstatement of fact which demands correction. The CME, at page 2 of its reply brief, states that the CME's ruling of March 17, 1970 was proper because such action was taken in accordance with the

"CME's rules relating to 'emergency' situations, *i.e.*, Rules 908, 1229 and 1230."

Nothing could be further from the truth. The CME's order of March 17, 1970 which forms the basis for this lawsuit was issued by the Business Conduct Committee of the CME acting pursuant to Rule 217(D). The order specifically states "The Business Conduct Committee, at a meeting held today, has ruled as follows . . . ." (Complaint, Exhibit "A".) The members of the Business Conduct Committee present at the meeting on March 17, 1970 have likewise all testified in this proceeding that the order of March 17, 1970 was issued by their Committee pursuant to Rule 217(D) of the CME. See, for example, the testimony of Mr. William Brodsky at pages 23, 36 of his deposition. The truth is, that the emergency rules of the CME referred to in the CME's reply brief were not invoked and have no relevance whatsoever to this litigation.

Rule 908 sets forth certain situations in which the President of the CME, with the concurrence of the Clearing House Committee, the Chairman of the Board or the Chairman of the Clearing House Committee, or the Board of Governors of the CME may stop trading, limit trading to liquidation trades or specify certain price conditions that will govern trading. Both the Chairman of the Board and the President of the CME have testified that the action challenged in this lawsuit was taken by the Business Conduct Committee, and that they made no recommendations to such Committee and had no vote in determining the Business Conduct Committee's March 17, 1970 action. In the latter regard, see the deposition testimony of Leo Melamed at pages 8, 22, 27-29, 35-37 and the deposition testimony of Everette B. Harris at pages 3, 20-23. Rule 908 clearly has

no application to the procedures to be followed by or the powers of the Business Conduct Committee.

Likewise, Rule 1229 prescribes certain conditions under which the President of the CME, or a Committee consisting of the Chairman of the Board, the Chairman of the Clearing House and the President, may require additional margins. As in the case of Rule 908, this Rule has no applicability to the present controversy. The action at issue was not taken pursuant to Rule 1229 nor even by the persons empowered to act under Rule 1229.

The third rule cited by the CME, Rule 1230, is similarly inapplicable. It pertains only to certain emergency action which the Manager of the Clearing House may take if daily market fluctuations require the early posting by Clearing Members of settlement and/or initial margin checks. Such power is conferred on the Manager of the Clearing House, not the Business Conduct Committee; the powers so conferred are not those exercised by the Business Conduct Committee in its order of March 17, 1970.

The CME did not act or purport to act, in this case, pursuant to or in accordance with Rules 908, 1229, 1230 or any combination thereof. The CME acted only through its Business Conduct Committee. Rule 217(D), the only Rule involved in this litigation, prescribes certain procedures which must be followed by this Committee. In this regard the record is clear. The Business Conduct Committee, in taking its action on March 17, 1970, totally failed to provide the notice and hearing required by such Rule. In fact, the Committee acted with a complete disregard for due process and the interests of those affected by its ruling, for which conduct the CME ought be held accountable.

For the reasons stated herein and in Respondents' prior Brief, the Chicago Mercantile Exchange's Petition should be denied.

Respectfully submitted,

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